IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE RESPONSE TO**
v.	)	**PROSECUTION REQUEST FOR**
	)	**LEAVE TO RESPOND TO THE**
MANNING, Bradley E., PFC	)	**DEFENSE'S MOTION TO**
U.S. Army, (b) (6)	)	**REQUIRE NON-EX PARTE**
Headquarters and Headquarters Company, U.S.	)	**FILING**
Army Garrison, Joint Base Myer-Henderson Hall,	)	
Fort Myer, VA 22211	)	23 May 2012
	)	

RELIEF SOUGHT

1. PFC Bradley Manning, by and through the undersigned Defense counsel, opposes the Government's request for leave of Court to respond to the Defense Motion to Require Non-*Ex Parte* Filing by Government until 29 May 2012. The Defense requests that the Court order the Government to respond by 24 May 2012.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Government has the burden of persuasion. RCM 905(c)(2)(A). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

FACTS

3. On 18 May 2012, the Government filed an *in camera* motion for substitutions under MRE 505(g)(2). On 21 May 2012, the Defense requested by e-mail that the Court order the Government to file a non-*ex parte* version of its motion. On 22 May 2012, the Court requested the Defense to file a written motion in support of its request. The Defense complied with the Court's request on that same day.

4. The Court ordered the Government to file a response to the Defense's motion by close of business on the 24 May 2012. The Government then requested leave of the Court until 29 May 2012 to respond to the Defense's motion. The Defense opposed the Government's request.

APPELLATE EXHIBIT CVIII (108)
Page____ of Page(s)

ARGUMENT

5. The relief requested by the Government: a) is based upon false assumptions and, b) does not provide the Court with enough time to properly adjudicate this matter during the next Article 39(a) session.

A. The Government's False Assumptions

6. The Government asserts that the Defense "has had adequate time to prepare a motion to request the Court not to consider material *ex parte*, especially since they were on notice that the Court ordered the classified information to be disclosed to the Court and not to the defense and the Court." *See* Prosecution Request for Leave dated 23 May 2012 (emphasis in original). The Government clearly does not understand the Defense's motion.

7. The Defense is not requesting that the Court refuse to consider material *ex parte* from the Government. Instead, the Defense is simply requesting that the Government file, in addition to its *ex parte* filing to the Court, a separate non-*ex parte* filing to the Court and Defense as required by MRE 505(i)(4)(A). Such a filing is required in order to provide the Defense with the ability to participate in the *in camera* session with respect to the proposed redactions and substitutions. *See* Analysis to MRE 505(i)(4)(A).

8. The Government is also mistaken when it asserts that the Defense is contesting the process as the Court outlined in its 23 March 2012 Order. The Defense is not. The 23 March 2012 order contemplates a response by the Defense for a Government MRE 505(g)(2) filing. The Government's MRE 505(g)(2) filing falls under the procedure for *in camera* review IAW MRE 505(i). The Defense had assumed that a non-*ex parte* filing for the Defense would have accompanied the Government's 18 May 2012 filing with the Court. When it was clear the Government was not planning to file anything for the Defense to respond to, the Defense requested the Government to file the required non-*ex parte* version of its motion.

B. Timing Issues Presented by the Government's Request

9. The Government requests almost a week to respond to a straightforward motion. The Defense cited one case (which had already been provided to the Court and the Government) and cited one subsection of MRE 505 in support of its motion. It should not take five prosecutors nearly a week to respond to the issue raised.

10. This matter needs to be resolved during the 39a sessions scheduled from 6-8 June 2012. Allowing the Government to delay filing their response until 29 May will compress the motion schedule prior to the next iteration court appearances. That compressed schedule will make it difficult, if not impossible, to litigate this motion in June. For instance, if the Court rules for the Defense on the necessity of a non-*ex parte* filing on 29 May, then the Government would likely ask for at least another 4 duty days to compose the non-*ex parte* filing. That request, if granted, would bring us to 4 June 2012, the same calendar week of the pre-trial hearings. Given that the Defense will be travelling during that time, with limited access to research materials and the

internet, it would not be able to respond (or respond adequately) to the Government's motion for redactions and substitutions.

CONCLUSION

11. In accordance with the above, the Defense requests that you order the Government to provide a response by the Court's original filing date of 24 May 2012. That way, this issue can be resolved at the upcoming motions argument.

Respectfully submitted,

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MAJ, JA
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